

MANDATE

11-1153-cv (L)
Westport Ins. Co. v. The Hamilton Wharton Group, Inc., et al.

N.Y.S.D. Case #
10-cv-2188(RMB)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of May, two thousand twelve.

PRESENT: RICHARD C. WESLEY,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

WESTPORT INSURANCE CORPORATION,

*Plaintiff-Counter-Defendant-Appellant-
Cross-Appellee,*

v.

11-1153-cv (Lead)
11-1493-cv (XAP)

THE HAMILTON WHARTON GROUP INC., WALTER B. TAYLOR,
INDIVIDUALLY

*Defendants-Counter-Claimants-Third Party
Plaintiffs-Appellees-Cross-Appellants,*

INTER-COMMUNITY MEMORIAL HOSPITAL OF NEWFANE, INC.,
INTERGRATED CARE SYSTEMS, LLC, ATHEALTHCARE, LLC, AARON
SELIGSON, MARTIN S. ROTHMAN, ABRAHAM V. FRIEDMAN, ESTATE OF
HERBERT A. ROTHMAN, ESTATE OF BERNARD FEUER PARTNERS, DBA
BROOKHAVEN BEACH HEALTH RELATED FACILITY, ESTATE OF BERNARD
FEUER, PARTNERS, DBA ROCKVILLE RESIDENCE MANOR, AMERICAN
GERI-CARE, INC., BEZALEL NURSING HOME COMPANY, INC.,
CREATIVE LIFESTYLES, INC., PREFERRED HEALTH CARE SERVICES
INC., NOW KNOWN AS COTTAGE HOMECARE SERVICES, INC., EAST NEW
YORK URBAN YOUTH CORPS, E.R.N.H., AKA EAST ROCKAWAY NURSING
HOME, ELMHURST CARE CENTER, INC., GEORGE KATZ, DBA THE NEW

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DOC #:
DATE FILED: June 11, 2012

MANDATE ISSUED ON 06/11/2012

1 BRIGHTON MANOR OF LONG BEACH HOME FOR ADULTS, SUZIE KLEIN,
 2 DBA THE NEW BRIGHTON MANOR OF LONG BEACH HOME FOR ADULTS,
 3 GREATER NEW YORK HOME CARE SYSTEMS, INC., HIGHLAND CARE
 4 CENTER, INC., HUDSON VALLEY HOME CARE, INC., KESER NURSING &
 5 REHABILITATION CENTER, INC., LOGAN & LOGAN, INC., FKA CEDAR
 6 LODGE NURSING HOME, NEW SOUTH SHORE MANOR, NEW YORK COUNTY
 7 SERVICES REVIEW ORGANIZATION, NYACK MANOR NURSING HOME,
 8 OYSTER BAY MANOR SENIOR RESIDENCE, INC., PERSONNEL
 9 MANAGEMENT SERVICES, LLC, QUALITY HEALTHCARE, INC., ROYAL
 10 HEALTH CARE SERVICES, INC., ST. MICHAEL'S HOME, THE
 11 DENNELISSE CORPORATION, THE ESTATE OF PAUL C. MAGGIO, DBA
 12 PATCHOGUE NURSING CENTER, UNIQUE PEOPLE SERVICES, INC.,
 13 UNITED PRESBYTERIAN AND REFORM ADULT MINISTRIES, DBA
 14 FLUSHING HOUSE, PRAXIS HOUSING INITIATIVES, INC., DBA THE
 15 BARBOUR HOTEL, ALTERNATIVE STAFFING, INC., BHHEALTHCARE
 16 SERVICES, INC., DBA NURSING PERSONNEL, BARKSDALE MANAGEMENT,
 17 CORP., BRIARWOOD MANOR, INC., BRONXWOOD HOME FOR THE AGED,
 18 INC., CARING PROFESSIONALS, INC., CEDAR MANOR, INC., COHME,
 19 INC., CROWN NURSING HOME ASSOCIATES, INC., DENTSERV DENTAL
 20 SERVICES, P.C., DESMOND MCMANUS, DBA BAYSHORE HOME FOR
 21 ADULTS, TELFORD HOME ASSISTANCE, INC., DBA EXTENDED CARE
 22 HEALTH SERVICES, EXTENDED NURSING PERSONNEL CHHA, INC., GEM
 23 HEALTHCARE EMPLOYMENT AGENCY, INC., HOLLISWOOD CARE CENTER,
 24 INC., INTERIM HOUSING, INC., MEADOWBROOK CARE CENTER, INC.,
 25 NASSAU-SUFFOLD HOME CARE AND AIDES, INC., RECREATIONAL
 26 SERVICES, INC., UNION PLAZA NURSING HOME, INC., VISITING
 27 NURSE REGIONAL HEALTH CARE SYSTEM, INC., WEST SIDE
 28 FEDERATION FOR SENIOR AND SUPPORTIVE HOUSING, INC.,
 29

30 *Defendants-Appellees,*
 31

32 IAAC, INC., INDEPENDENT INSURANCE AGENTS & BROKERS OF NEW
 33 YORK, INC.
 34

35 *Third-Party Defendants-Appellees.*
 36
 37

38
 39 JOYCE F. NOYES (Robert P. Conlon, James W.
 40 Kienzle, *on the brief*), Walker Wilcox
 41 Matousek LLP, Chicago, IL, for Plaintiff-
 42 Counter-Defendant-Appellant-Cross-
 43 Appellee Westport Insurance Corporation.
 44
 45

KEVIN L. SMITH (Derek I.A. Silverman, on the brief), Stroock & Stroock & Lavan LLP, New York, NY, for Defendants-Counter-Claimants-Third Party Plaintiffs-Appellees-Cross-Appellants The Hamilton Wharton Group, Inc., Walter B. Taylor, individually.

Joseph E. Zdarsky, Sr. (David E. Gutowski, on the brief), Zdarsky Sawicki & Agostinelli LLP, Buffalo, NY, for Defendants-Appellees Inter-Community Memorial Hospital of Newfane, Inc. Eastern Niagara Hospital, Inc. and Integrated Care Systems, LLC.

Steven J. Ahmuty, Jr., Timothy R. Capowski, Gerard S. Rath, Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success, NY, for Defendants-Appellees A & T HealthCare, LLC; Bezalel Nursing Home Company, Inc.; Creative Lifestyles, Inc.; E.R.N.H. Corporation, Inc. d/b/a East Rockaway Nursing Home; Elmhurst Care Center, Inc.; George Katz d/b/a The New Brighton Manor of Long Beach Home for Adults; Suzie Klein d/b/a The New Brighton Manor of Long Beach Home for Adults; Highland Care Center, Inc.; Hudson Valley Home Care, Inc.; New South Shore Manor; Nyack Manor Nursing Home; Royal Health Care Services, Inc.; The Dennelisse Corporation; The Estate of Paul C. Maggio d/b/a Patchogue Nursing Center; Unique People Services, Inc.; United Presbyterian and Reformed Adult Ministries, Inc. d/b/a Flushing House; and New York County Health Services Review Organization.

Richard Scott Atwater, Gross, Shuman, Brizdle & Gilfillan, P.C., Buffalo, NY, for Defendants-Appellees Alternative Staffing, Inc.; B & H HealthCare Services, Inc. d/b/a Nursing Personnel; Barksdale Management, Corp.; Briarwood

1 Manor, Inc.; Bronxwood Home for the Aged,
2 Inc.; Caring Professionals, Inc.; Cedar
3 Manor, Inc.; COHME, Inc.; Crown Nursing
4 Home Associates, Inc.; Dentserv Dental
5 Services, P.C.; Desmond McManus d/b/a
6 Bayshore Home for Adults; Telford Home
7 Assistance, Inc., d/b/a Extended Care
8 Health Services, Extended Nursing
9 Personnel CHHA, Inc.; GEM Health Care
10 Employment Agency, Inc.; Holliswood Care
11 Center, Inc.; Interim Housing, Inc.;
12 Meadowbrook Care Center, Inc.; Nassau-
13 Suffolk Home Care & Aides, Inc.;
14 Recreational Services, Inc.; Union Plaza
15 Nursing Home, Inc.; Visiting Nurse
16 Regional Health Care System, Inc.; and
17 West Side Federation for Senior and
18 Supportive Housing, Inc.

19
20 Robert J. Grande, Keidel, Weldon & Cunningham,
21 LLP, White Plains, NY, for Third-Party
22 Defendants-Appellees IAAC, Inc. and
23 Independent Insurance Agents & Brokers of
24 New York, Inc.

25
26 Robert Leonard Schonfeld, Moritt Hock &
27 Hamroff LLP, Garden City, NY, for Praxis
28 Housing Initiatives, Inc. d/b/a Barbour
29 Hotel.

30
31 Appeal from the United States District Court for the
32 Southern District of New York (Berman, J.).
33

34 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
35 **AND DECREED** that the judgment of the United States District
36 Court for the Southern District of New York is **AFFIRMED**.

37 Appellant Westport Insurance Corporation ("Westport")
38 appeals from the February 23, 2011 Decision and Order of the
39 United States District Court for the Southern District of

1 New York (Berman, *J.*), granting summary judgment to the
2 appellees and dismissing Westport's declaratory judgment
3 action (the "DJ Order"). Westport sought a declaratory
4 judgment that a professional liability insurance policy (the
5 "Policy") issued by Westport to Appellee Hamilton Wharton
6 Group, Inc. ("Hamilton Wharton") does not impose upon
7 Westport either a duty to defend or a duty to indemnify
8 Hamilton Wharton in four lawsuits filed in New York State
9 Supreme Court (the "State Actions") against Hamilton Wharton
10 and its owner, Walter B. Taylor ("Taylor," together with
11 Hamilton Wharton, the "Defendants"). In the DJ Order, the
12 district court found that (i) Westport had a duty to defend
13 the Defendants and (ii) the complaint should be dismissed as
14 "premature" with respect to the Defendants' duty to
15 indemnify because "issues of fact on which the insurance
16 coverage depends" have yet to be adjudicated in the State
17 Actions. On March 31, 2011, the district court awarded the
18 Defendants' counsel attorneys' fees in the amount of
19 \$159,477.50 and costs of \$26,317.91 (the "Attorneys' Fees
20 Award"). Both Westport and the Defendants also appeal from
21 the Attorneys' Fees Award. We assume the parties'
22 familiarity with the facts, procedural history, and issues
23 presented for review.

1 We review *de novo* the district court's grant of summary
2 judgment, "construing the evidence in the light most
3 favorable to the non-moving party and drawing all reasonable
4 inferences in its favor." *Costello v. City of Burlington*,
5 632 F.3d 41, 45 (2d Cir. 2011); see Fed. R. Civ. P. 56(a).

6 The district court did not err in concluding that the
7 State Actions trigger Westport's duty to defend. Under New
8 York law—which the parties agree applies in this case—an
9 insurer's duty to defend is broader than its duty to
10 indemnify and has been described by the New York Court of
11 Appeals as "exceedingly broad." *Colon v. Aetna Life & Cas.*
12 *Ins. Co.*, 66 N.Y.2d 6, 8 (1985). Indeed, "[s]o long as the
13 claims [asserted against the insured] may rationally be said
14 to fall within policy coverage, whatever may later prove to
15 be the limits of the insurer's responsibility to pay, there
16 is no doubt that it is obligated to defend." *Seaboard Sur.*
17 *Co. v. Gillette Co.*, 64 N.Y.2d 304, 310-11 (1984)
18 (alterations in original) (internal quotation marks
19 omitted).

20 Here, the claims asserted against Westport may
21 rationally be said to fall within the Policy's coverage.
22 The "professional services" contemplated by the Policy
23 encompass *at least some* of the activities alleged in the

1 State Actions, which included, *inter alia*, allegations that
2 the Defendants were negligent in handling their funds by:
3 continuing to sign up new participants to join the trust;
4 failing to hire an accountant; offering unwarranted
5 discounts to trust members; failing to implement safety
6 audits; and failing to conduct payroll audits.

7 Westport contends that the Policy's Insolvency
8 Exclusion bars coverage for the underlying complaints and
9 that the district court erred because it failed to analyze
10 this exclusion. The district court did not address the
11 applicability of the Insolvency Exclusion for good reason.
12 To the extent the issue was raised below at all, Westport
13 offered only conclusory assertions that the Insolvency
14 Exclusion barred coverage even though Westport bore the
15 "heavy burden" of establishing the applicability of the
16 exclusion. *Commercial Union Assurance Co. v. Oak Park*
17 *Marina, Inc.*, 198 F.3d 55, 61 (2d Cir. 1999). Westport's
18 conclusory assertions, rather than argument, were
19 insufficient to preserve this issue for appellate review.
20 See *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d
21 151, 154 (2d Cir. 1999). "'It is a well-established general
22 rule that an appellate court will not consider an issue
23 raised for the first time on appeal.'" *Allianz Ins. Co. v.*

1 *Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (quoting *Greene v.*
2 *United States*, 13 F.3d 577, 586 (2d Cir. 1994)). While we
3 have the discretion to relax this rule to consider a purely
4 legal issue or to avoid manifest injustice, we see no reason
5 to exercise such discretion under the circumstances of this
6 case. *Id.* Moreover, we are not persuaded that *all* of the
7 claims against Hamilton Wharton and Taylor in the underlying
8 complaints would fall within the scope of the Insolvency
9 Exclusion. Notably, the Niagara complaint lacks any
10 allegations referring to the trust's insolvency or financial
11 inability to pay.

12 Next, Westport contends that the district court erred
13 in dismissing as premature Westport's action as to its duty
14 to indemnify. We review a district court's decision to
15 refuse to exercise jurisdiction over a declaratory judgment
16 action "deferentially, for abuse of discretion." *Dow Jones*
17 *& Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003).
18 Where, as here, "another suit is pending in a state court
19 presenting the same issues, not governed by federal law,
20 between the same parties," it is entirely appropriate for a
21 district court to dismiss a declaratory judgment action.
22 *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)
23 (internal quotation marks omitted). As the district court

1 noted, the declaratory judgment action and the State Actions
2 have numerous unresolved issues in common, including whether
3 the Defendants were negligent or breached fiduciary or
4 contractual obligations. As a result, the district court
5 did not abuse its discretion in dismissing as premature the
6 indemnification portion of Westport's declaratory judgment
7 action.

8 We also reject Westport's contention that it was
9 prejudiced because the district court denied its request for
10 discovery in response to the Defendants' motion for summary
11 judgment. See Fed. R. Civ. P. 56(d); see also *Gualandi v.*
12 *Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004). In assessing
13 whether Westport had a duty to defend and indemnify, the
14 district court was required to "compare the allegations of
15 the complaint to the terms of the policy." *A. Meyers & Sons*
16 *Corp. v. Zurich Am. Ins. Grp.*, 74 N.Y.2d 298, 302 (1989).
17 It was not required to consider the additional materials
18 submitted by the Defendants, and there is no evidence that
19 it actually did so. Accordingly, the district court did not
20 abuse its discretion in precluding Westport from conducting
21 additional discovery.

22 Next, we address the parties' objections to the
23 Attorneys' Fees Award. The scope of our review in this

1 regard is "circumscribed." *Chambless v. Masters, Mates &*
2 *Pilots Pension Plan*, 885 F.2d 1053, 1057 (2d Cir. 1989).

3 The district court has "the best vantage point from which to
4 assess the skill of the attorneys and the amount of time
5 reasonably needed to litigate a case." *Id.* at 1057-58.

6 Moreover, "attorney's fees are to be awarded with an eye to
7 moderation, seeking to avoid either the reality or the
8 appearance of awarding windfall fees." *N.Y. State Ass'n for*
9 *Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139 (2d
10 Cir. 1983)(citation and internal quotation marks omitted).
11 Thus, the district court's calculation of attorneys' fees
12 will not be disturbed absent a clear abuse of discretion.
13 *Chambless*, 885 F.2d at 1058.

14 The district court did not abuse its discretion by
15 reducing the Defendants' counsel's hourly rates. The
16 district court relied on several valid considerations in
17 making its determination, including: the limited time and
18 labor required, the relatively straightforward nature of the
19 case, the absence of severe time demands, and the rates
20 awarded in similar cases. *See, e.g., U.S. Football League*
21 *v. Nat'l Football League*, 887 F.2d 408, 415 (2d Cir. 1989)
22 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d
23 714, 717-19 (5th Cir. 1974)).

1 The Defendants counter that the district court relied
2 on "historic rates that no longer apply, as well as the
3 rates of opposing counsel." We disagree. The Defendants
4 have not demonstrated that any of the rates relied on by the
5 district court no longer prevail in the Southern District of
6 New York. It was also not error for the district court to
7 consider the rates charged to Westport's counsel. This was
8 one of several factors relied on by the district court, and
9 it was certainly not an unreasonable consideration given
10 that the Defendants' counsel requested fees were
11 approximately four times greater than the fees Westport paid
12 to its own counsel for the same work.

13 We also decline Westport's invitation to further reduce
14 the Attorneys' Fees Award. Westport's reliance on the
15 hourly rates of other appellees, as well as the hourly rates
16 awarded in *GuideOne Specialty Mutual Insurance Co. v.*
17 *Congregation Adas Yereim*, No. 1:04-cv-5300 (ENV)(JO), 2009
18 WL 3241757, at *3 (E.D.N.Y. Sept. 30, 2009), is misplaced.
19 Counsel for the other appellees are located in Buffalo or in
20 Lake Success, New York and thus, do not represent the
21 "prevailing community a district court should consider to
22 determine" the reasonable hourly rate. *Reiter v. MTA N.Y.*
23 *City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006).

1 Similarly, *GuideOne* involved an award to attorneys in the
2 Eastern District of New York, and the *GuideOne* court noted
3 that Manhattan attorneys' rates are higher than those in
4 Brooklyn. *Id.* at *3.

5 In addition, Westport's contention that the proposed
6 time entries were unreasonable is unavailing. The district
7 court reduced the number of hours credited to the
8 Defendants' counsel by 35% from 772.8 hours to approximately
9 502.3 hours. Westport admitted that its own counsel devoted
10 just over 400 hours to this litigation. The district court
11 did not abuse its discretion in reducing the number of hours
12 by 35%.

13 Finally, the district court did not abuse its
14 discretion in awarding costs. The costs sought by the
15 Defendants' counsel reflected, among other things, in-house
16 duplication costs, telephone charges, meals, overtime, local
17 transportation, postage, electronic legal research, and
18 messenger service. All of these categories of costs are
19 "the sort of expenses that may ordinarily be recovered" as
20 part of a fee award, and are not treated as "overhead
21 expenses." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763
22 (2d Cir. 1998); see also *Kuzma v. Internal Revenue Serv.*,
23 821 F.2d 930, 933-34 (2d Cir. 1987); *Aston v. Sec. of Health*

1 *and Human Servs.*, 808 F.2d 9, 12 (2d Cir. 1986).

2 Accordingly, it was not error for the district court to
3 compensate the Defendants' counsel for a portion of these
4 costs.

5 We have considered all of the parties' remaining
6 arguments and, after a thorough review of the record, find
7 them to be without merit.

8 For the foregoing reasons, the judgment of the district
9 court is hereby **AFFIRMED**. As a result, the Third-Party
10 Defendants' motion to strike the Defendants' request for
11 leave to re-file the Third-Party Complaint is denied as
12 **MOOT**.

13 FOR THE COURT:
14 Catherine O'Hagan Wolfe, Clerk
15
16

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", written in blue ink. Overlaid on the signature is the official seal of the United States Court of Appeals, Second Circuit. The seal is circular with a red border containing the text "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the seal, the words "SECOND CIRCUIT" are written in the center.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

This block contains a larger version of the signature and seal seen in the previous block. It features the handwritten signature "Catherine O'Hagan Wolfe" in blue ink, with the official seal of the United States Court of Appeals, Second Circuit overlaid on it. The seal is circular with a red border and contains the text "UNITED STATES", "COURT OF APPEALS", and "SECOND CIRCUIT".